

a

MINISTER OF RESOURCE PLANNING & ORS.

v.

KERUNTUM SDN. BHD.

SUPREME COURT, KUCHING

SALLEH ABAS LP

b

GEORGE SEAH SCJ

HASHIM YEOP SANI SCJ

[CIVIL APPEAL NO. 407 OF 1987]

23 MARCH 1988

c

ADMINISTRATIVE LAW: *Motion for certiorari and prohibition allowed - Appeal against - Scope of s. 2(2) Forest Ordinance - Question of automatic invalidity - No reasons given for revocation of licence - Principle of fairness and prudent administration applies - Opportunity to be heard - View supported by provisions in Ordinance.*

d

A forest timber licence was issued to the respondent (Keruntum Sdn. Bhd.) on 10 October 1983 for a period of 25 years for a piece of timber land in Long Akah area. Clause 31 declares the licence to be non-transferable and cl. 24 requires 3 months' notice in writing before termination of licence. On 11 March 1987, the Director of Forests revoked licence without giving any reason in a brief letter. Respondent obtained leave to commence proceedings for orders of *certiorari* and prohibition to quash the revocation and to prohibit the Director, the Minister Govt. of Sarawak (appellant) from acting upon the purported revocation. Order for stay was also granted. However, by a letter on 15 May 1987 the Director informed that licence was not revoked but became automatically invalid by operation of law as a result of acts done including the transfer of controlling shares. The Judge allowed the motion for *certiorari* and prohibition. The Government appealed and the respondent cross-appealed on the Judge's ruling that s. 55 licences are an extension of s. 51 licences.

*e***Held:***f*

[1] Licences issued under s. 49, s. 51 or s. 55 are of different kinds. Section 55 governs licence with special conditions to take forest produce irrespective of whether licence is in respect of forest reserves and protected forests or not. In this case, the licence was intended to be one issued under s. 55.

g

[2] Section 55 does not contain similar provision with s. 51 which states that the licence shall not be transferable. Licences issued under s. 51 per se can be transferable but this is subject to policy decision on part of Minister and Director of Forests. In this case, non-transferability was achieved by including Clause 31.

h

[3] Section 2(2) applies to licences issued under s. 51 or s. 55 of the Ordinance when s. 2(2) applies, burden of proving the licence is valid shifts to the respondent. The letter dated 11 March 1987 did not give any reasons for the revocation. Section 2(2) indicates that no automatic invalidity of licence exists and in making decision, the Director applying the principle of fairness and prudent administration has to allow the licensee to show acceptable reason as to why the licence should not be regarded as invalid and therefore cancelled.

i

[4] Section 51(7) and s. 93 support the contention that a licence does not automatically become invalid upon the happening of any of the events mentioned in s. 2(2).

[5] The respondent was deprived of an opportunity to explain the invalidating event and to discharge the burden which would entitle it to a contrary decision of the Director.

[Appeal dismissed with costs. No order to costs on cross-appeal. Deposit be paid to respondent.] **a**

Case referred to:

Pemungut Hasil Tanah, Daerah Barat-daya, Pulau Pinang v. Ong Gaik Kee [1983] 2 MLJ 35

Legislation referred to:

Forest Ordinance (Cap 126) (Sarawak), ss. 2(2), 49, 51, (4), (7), 55, 93, (b) **b**

For the appellant - Michael J Beloff, QC; Datuk C.T. Wong; J.C. Fong; Lim Heng Choo; M/s. Reddi & Co.

For the respondent: G. Sri Ram; Goh Choo Kee; Colin Lau; M/s. Abdul Rahman, Chan, Jugah, Wan Ullok & Co.

JUDGMENT

Salleh Abas LP:

On 10 October 1983, the Director of Forests, Sarawak, with the approval of the Minister, issued to the respondent, (Keruntum Sdn. Bhd.), a forest timber licence No. T/0279, for 25 years, covering 188, 926 hectares of timber land in Long Akah area. The licence was issued pursuant to an application made by one Haji Mohamed Louis Ali in a letter dated 27 December 1982, addressed to the Minister of Forestry (now the Minister of Resource Planning), being the Minister then responsible for forest matters. **d**

The licence has several clauses - 32 in all. Under cl. 31, the licence is declared to be non-transferable and under cl. 24 the Director of Forests may with the approval of the Minister terminate the licence by giving three months notice in writing if the respondent fails to comply with any of the provisions and conditions of the licence. **e**

On 11 March 1987 the Director in a very brief letter informed the respondent that the licence was thereby revoked. No reason was given for the revocation. Subsequently, on 8 April 1987, pursuant to an *ex parte* application, the respondent obtained leave from the High Court at Kuching to commence proceedings for orders of *certiorari* and prohibition to quash the revocation and to prohibit the Director, the Minister and the Government of Sarawak, (appellants), from acting upon the purported revocation. The respondent also obtained an order for a stay of any further action to be taken by the appellants based upon the said revocation. **f**

It was not until after such leave was granted, however, that the Director by a letter dated 15 May 1987, informed the respondent that the licence was not revoked but became automatically invalid by operation of law as a result of the respondent's own act and the acts of its own shareholders which acts were done without permission of the Director. One of these acts is that the controlling shares in the respondent were transferred since the date of the issue of licence. **g**

The motion for *certiorari* and prohibition was heard by Datuk Abu Mansor J on 4 and 20 June 1987, and on 10 August, in a very careful written judgment, the learned Judge allowed the motion. He held that the respondent was entitled to the order of *certiorari* because under cl. 24 of the licence it was entitled to a three months' notice before the licence could be terminated. **h**

In this appeal Mr. Beloff (Counsel for the appellants) submitted to us that the appeal should be decided on the basis of s. 2(2) of the Ordinance, which for the sake of convenience is set out as follows: **i**

- a** (2) Where a licence or permit is, under this Ordinance, declared not to be transferable, the licence or permit shall, unless the Director or a person authorized by him in that behalf otherwise directs, be invalid if:

(a)

(b) in the case of a licence or permit issued to a company, the controlling shares in the company are transferred;

b

(c)

(d) the holder thereof enters into an agreement with any other person, the effect of which is to enable the benefits conferred by the licence or permit to be enjoyed by any other person.

- c** It is the crux of his submission that as soon as any of the events stated in para. (a) to (d) happened, the respondent's licence became automatically invalid unless the respondent can show that the Director or any person authorized by him has given any contrary direction. In this case the relevant event is the para. (b) event in that the controlling shares in the respondent were transferred on 14 December 1983.

- d** Mr. Sri Ram, Counsel for the respondent, conceded that there had been such transfer but disagreed as to the application and construction of s. 2(2). He submitted that because of the phrase "declared not to be transferable", s. 2(2) only applies to cases where a licence is declared nontransferable by the Ordinance. Thus, where a licence like the present one is made nontransferable by the licence itself, i.e., cl. 31, s. 2(2) does not apply.

What then is a licence declared non-transferable by the Ordinance?

- e** There are three sections which authorise the issue of licences: namely, s. 49, s. 51 and s. 55. Of these three sections only s. 51 contains a provision, i.e., (sub-section (4)) that the licences "shall not be transferable". Thus according to Mr. Sri Ram's submission only a licence issued under s. 51 is the one "declared not to be transferable" for the purpose of application of s. 2(2). Unlike s. 51, however, s. 55 has no similar provision. The non-transferability of the licence thereunder is achieved by the inclusion of a clause in the licence itself (cl. 31). Therefore,
- f** Mr. Sri Ram submitted, a licence issued under s. 55 is not a licence "declared not to be transferable" and as such cannot be brought under the regime of s. 2(2).

- The crux of this submission really lies at a distinction between a licence issued under s. 51 and a licence issued under s. 55. On this point the learned Judge made a ruling, which is strongly supported by Mr. Beloff, to the effect that the licence in this case was issued under s. 51 as enlarged or amplified by s. 55. The learned Judge said: "Since I take the view that s. 55 licence is in substance an extension of a s. 51 licence and declared by s. 51(4) to be non-transferable it therefore comes for interpretation under s. 2(2) of the Ordinance." Mr. Sri Ram disputed the correctness of this ruling and lodged a cross appeal on it contending that the learned Judge should have held that the licence was issued under s. 55 and that s. 55 is an independent source of power and not a mere extension of s. 51. Finally, Mr. Sri Ram submitted that even if s. 2(2) is applicable, there must be a right of representation to be given to the respondent, which, in this case, none at all was given.
- g**
- h**

- The first question to be determined here is therefore whether or not this licence, i.e., Licence No. T/0279, was issued under s. 51 or under s. 55? As already stated earlier there are three separate provisions in the Ordinance which deal with the issue of forest licences. These are ss. 49, 51 and 55. For the sake of easy references the three sections are therefore set out below:
- i**

49. Subject to the provisions of ss. 23, 37 and 65, the taking of forest produce in forest reserves and protected forests shall be controlled and regulated by the Director who may:
- (a) issue such licences or permits in such form and under such conditions as he may deem expedient;
 - (b) call for tenders for the right to take forest produce from a specified area;
 - (c) fix the fees, royalties, premia or other payments to be made in respect of such forest produce in any particular case; and
 - (d) Permit any other works that he may deem necessary for the taking of such forest produce or for the management of the forest:

Provided that no licence or permit issued under this section may be valid for a period exceeding one year after the date of issue or renewal thereof, except with the express permission of the Minister.

- 51.(1) Licences and permits for the taking of forest produce on State land other than forest reserves or protected forests, may be issued by the Director or any forest or other Government officer generally or specially authorized by him.
- (2) Such licences and permits may not be issued for a period exceeding one year, except with the express permission of the Minister and under such conditions as he may approve, and shall be applicable only to the areas and kinds of produce named therein.
- (3) Immediately upon the expiration of a licence or permit, it shall be returned to the officer who issued it.
- (4) Licences and permits shall not be transferable.
- (5) Licences and permits may be refused at the discretion of the officer concerned:

Provided that an appeal may be made to the Director, whose decision shall be final.

55. Nothing contained in s. 51 or 52 shall be deemed to prohibit the Director, with the approval of the Minister, from issuing licences under special conditions, and for periods exceeding one year, in cases where he may deem such licences expedient.

Having regard to the learned Judge's ruling and the submission of Counsel for both sides the issue really turns upon the questions whether s. 55 is a part or an extension of s. 51 as held by the learned Judge or whether s. 55 is an independent section altogether from s. 51 as maintained by Mr. Sri Ram.

To answer this question, the important thing to observe is that s. 55, speaks of "licences under special conditions". Although the two sections appear to be relatively similar, upon close scrutiny there can be no doubt that the licences of which s. 55 speaks are of a different kind, being much bigger and more extensive in effect. To appreciate the true meaning of this section one must therefore look at it from the point of view of types or categories of licences rather than from the point of view of the powers of the Director of Forests to issue licences under the Ordinance.

There are three types of licences to take forest produce in Sarawak. The first type is a licence to take forest produce in forest reserves or protected forests. The second type is a licence to take forest produce on State land not being forest reserves or protected forests. And the third type is a licence with special conditions to take forest produce irrespective of whether the licence is in respect of forest reserves and protected forests or not. The first type is governed by s. 49, the second by s. 51, whilst the third by s. 55. But whatever type a licence may belong to, all licences require Ministerial approval if they are to exceed one year in duration.

- a** Having said this, we have now to consider how to determine whether a licence is one “under a special condition” issued pursuant to s. 55 when the expression “special conditions” are not defined by the Ordinance, bearing in mind a similarity that a licence issued under s. 51 may also be subject to “such conditions as the Minister may approve.” Is there any difference in the meaning between the expression “special conditions” in s. 55 and the expression “such conditions as the Minister may approve” in s. 51? From the practice of the
- b** Forest Department there appears to be such a distinction. According to the forms contained in the Forest Rules, licences issued under s. 49 and s. 51, appear to be very simple licences without much elaboration. (See Form III and Form IV). There is however no form prescribed for licences issued under s. 55. In this case, the licence i.e., Licence No. T/0279 is entirely different from those issued under ss. 49 and 51. It contains no less than 32 clauses altogether and the licence itself recites that it was issued under s. 55. The licence begins with the
- c** following words:

The Director of Forests in exercise of the powers conferred on him by ss. 49, 51 and 55 of the Forest Ordinance and with the approval of the Minister. ...

There is, however, a deletion of the letter “s” attached the word “sections”, and the figures “49 and 51”. Thus what remains is:

- d** The Director of Forests in exercise of the powers conferred on him by s. 55 of the Forests Ordinance and with the approval of the Minister. (Emphasis is ours)

- During the course of this appeal we were shown the original licence in possession of the respondent and the office copy in possession of the Director of Forests. The deletion was made on both copies by drawing a straight line in red from the letter “s” through figure “49” and figure “51”. Thus it is clear that the licence was intended by the Director to be one
- e** issued under s. 55.

- The next point to consider is the non-transferability of the licence. We may recall that s. 51 has a sub-section (4) which enacts that licences shall not be transferable. There is, however, no equivalent sub-section or provision in s. 55. Thus it is clear that all licences issued under s. 51 must *per se* be non-transferable whether the licence contains this provision or not since
- f** it is already the command of the statute that it should be non-transferable. There is no way in which such licences could be made transferable without amending the legislation. On the other hand the absence of an equivalent provision in s. 55 indicates that licences under special conditions need not necessarily be non-transferable. This section does not require that it must be non-transferable. Whether it is so or not it is a matter of policy decision on the part of the Minister and the Director of Forests. In this particular case the non-
- g** transferability was achieved by the inclusion of cl. 31 in the licence itself.

- Mr. Beloff maintained that this clause is merely a declaratory provision of sub-section (4) of s. 51. He would be right of course if we agree with him that licences issued under s. 55 are in fact licences issued under s. 51. However, we do not agree with his submission. In our view the licence was non-transferable because of the licence itself and not by virtue of the
- h** Ordinance.

- The next question to consider is whether this licence i.e., licence No. T/0279 is such a licence that comes under the expression “declared not to be transferable” within the meaning of s. 2(2). If so, sub-section 2(2) is applicable and if not the licence is beyond the reach of s. 2(2).

- i** Mr. Sri Ram submitted that since the licence is made non-transferable not by the Ordinance but only by the licence itself it therefore does not come within the meaning of expression “declared not to be transferable.”

In our view this argument tends to be hairsplitting. Whatever the position may be, it is undeniable that a licence issued under s. 55 is a licence issued under the authority of this Ordinance, irrespective of whether the non-transferability was achieved by the licence itself or as a result of a statutory provision. What is done by the licence must of necessity be regarded as done under the authority of the Ordinance. There is nothing in s. 2(2) which justifies a conclusion that the section only applies to a licence issued under s. 51. The expression “declared not to be transferable” in s. 2(2) for reasons we have given above does not restrict the operation of the section to licences issued under s. 51 only. It extends to licences issued under s. 55 also. Thus we hold that s. 2(2) applies to licences issued under s. 55 in the same way it does to licences issued under s. 51.

This brings us to the crucial issue of this appeal namely: what is the effect of s. 2(2) on the licence when any of the events mentioned in paras. (a), (b), (c) and (d) happens?

Mr. Beloff submitted to us strongly that the licence becomes automatically invalid when, as in this case, para. (b) was in fact violated in that the controlling shares in the respondent company were transferred. When pressed for any authority on the doctrine of automatic invalidity he was unable to show us any. However, according to his submission, automatic invalidity could be prevented if there is a contrary direction given by the Director or any person authorised by him and it is not for the appellants to show the existence of such contrary direction. In his view this burden of showing that there was a contrary direction must be on the respondent.

For the sake of clarity we wish to reproduce, the relevant part of the section, which is as follows:

Where a licence ... is under this Ordinance declared not to be transferable, the licence ... unless the Director or a person authorised by him in that behalf otherwise directs, be invalid if (a), (b), (c) and (d).

We accept his submission that the burden of proving the existence of a contrary direction is on the respondent, but how could the respondent do it if the Director had not given the respondent an opportunity to discharge that burden? In this case there has not been any such opportunity given. All that happened was that the Director of Forests wrote a very curt letter on 11 March 1987, stating that the licence was revoked. He gave no reasons for the revocation. It was only as a result of the respondent commencing proceedings for *certiorari* and prohibition in the High Court that the Director wrote a second letter on 15 May 1987 explaining the meaning of revocation and requesting the respondent to reconsider its judicial proceedings in the light of the explanation given. We, therefore, cannot accept Mr. Beloff’s submission that the licence became automatically extinguished or invalid the moment the transfer of controlling shares, or in other events mentioned in other paragraphs of the sub-section took place. The phrase “unless the Director or a person authorised by him in that behalf otherwise directs” is clearly intended by the legislature to mean that a licence does not become automatically invalid. This phrase indicates that the Director has a choice. The proper procedure which should be adopted by him seems to us to be this: as soon as he becomes aware of the happening of any of the events enumerated in paras. (a), (b), (c) and (d), he has to make up his mind whether to treat the licence as invalid or to treat it as still continuing. But before making any such decision one way or the other, the principle of fairness and prudent administration requires him to inform the licensee that his licence would be cancelled unless he can show an acceptable reason why it should not be regarded as invalid and therefore cancelled. This principle is in line with the dicta of the Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 2

a MLJ 35, which is as follows:

Every exercise of statutory power must not only be in conformity with the express words of the Statute but above all must also comply with certain implied legal requirements. The Court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant consideration or with gross unreasonableness (de Smith's, 4th Edn., p. 323; and

b *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation.*)

Further, under sub-section (7) of s. 51, it is an offence punishable with the penalty of two thousand dollars - if a licensee transfers or assigns his licence "against the provision of this Ordinance." Because of the expression "against the provision of this Ordinance", this subsection has the effect of excluding licences issued under s. 55 from being the subject-matter of the offence under sub-section (7) since the non-transferability of the licence issued under that section i.e., (s. 55) is not by "the provision of this Ordinance" but by the provision of the licence itself. Thus, if any licensee transfers or assigns his licence (being a licence issued to him under s. 55) though such licence is stated not to be transferable, such transfer will not be an offence within the meaning of sub-section (7) of s. 51.

c In cases where an offence is committed the Director has the power to terminate the licence in accordance with s. 93, which is as follows:

- d** 93. Upon conviction of the holder of a licence or permit issued under this Ordinance of a forest offence:
- (a) the Court may of its own motion cancel or suspend, for such period as it may think fit, such licence or permit; and
- e** (b) the Director may, unless the Court has either made an order under para. (a) or directed that the Director shall not exercise the power hereby given, terminate such licence or permit by two months' notice in writing to the holder thereof.

The Malaysian jurisprudence observed by the Courts throughout Malaysia is that any forfeiture of the licence following a conviction has always been ordered by the Court not as a matter of course but as a result of a judicial enquiry. The Court may or may not exercise the power to order the forfeiture but in any case before an order of forfeiture is made an enquiry must always be held. Thus since no automatic forfeiture is accepted in the case of a conviction of a penal offence it would be strange to invoke the notion of automatic invalidity in respect of a breach of a term of the licence which is essentially a contract and does not amount to a penal offence. Therefore, the provision of sub-section (7) of s. 51 and s. 93, whether read together or singly do not support the contention that a licence becomes automatically invalid upon the happening of any of the events mentioned in s. 2(2). On the other hand these two sections especially para. (b) of s. 93 reinforce our conviction that there is no automatic invalidity.

f There are two other matters raised by Mr. Beloff. First, if we cannot accept his submission on automatic invalidity we should nevertheless allow the appeal because para. 5 of the affidavits sworn on 24 March 1987 on behalf of the respondent contains a false statement to the effect that the respondent had "at all material times complied with all the terms and conditions of the said licence." Our answer to this submission is that the question of falsity of the statement is not beyond argument and since this is the first time that the matter was raised, it is now too late for us to do anything about it. It should have been raised in the Court below.

g

h

i

The second matter raised by Mr. Beloff is that we should make a ruling that the leave granted by the High Court to commence *certiorari* and prohibition proceedings in respect of other revoked licences should not have the effect of staying any action which the appellants might wish to take upon those licences. Again our response to this submission is that this is not a matter which concerns this particular appeal. We do not feel any necessity of making any ruling beyond what is required in the present appeal.

In conclusion we hold that there is no question of the licence becoming automatically invalid and that as the respondent was deprived of an opportunity to explain the invalidating event and to discharge the burden which would entitle it to a contrary decision of the Director, the appeal is therefore dismissed with costs. We also order that the deposit should be paid to the respondent on account of taxed costs.

As regards the cross-appeal by the respondent, we do not think that we should make any order as to costs since the issue raised in it is inextricably part and parcel of the main appeal.

Also found at [1988] 2 CLJ 431

a

b

c

d

e

f

g

h

i